THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Ford Construction Corp.

v.

TWG Construction Co., Inc. & Wal-Mart Real Estate Business Trust

Docket No.: 03-C-236

ORDER ON MOTION TO DISMISS

On September 17, 2003, Ford Construction Corp. ("Ford") commenced this action against TWG Construction Co. ("TWG") and Wal-Mart Real Estate Business Trust ("Wal-Mart") (collectively, "the defendants") to recover $192,692.16 it claims is due for labor and materials it provided in connection with the construction of Wal-Mart Store #3535 ("store #3535") in Epping, New Hampshire. That same day, Ford also filed a petition for ex parte attachment, which this court granted, seeking to attach store #3535 in the amount of $192,692.16. The defendants subsequently filed an objection to the ex parte attachment, and thereafter moved to dismiss the case for lack of jurisdiction. Ford objects. Upon review of the parties' pleadings, the contract at issue and the applicable law, the court finds and rules as follows.

In considering a motion to dismiss, the court determines "whether the allegations [in the plaintiff's pleadings] are reasonably susceptible of a construction that would permit

recovery." Putnam v. University of New Hampshire, 138 N.H. 238, 239 (1994) (quoting Collectramatic, Inc. v. Kentucky Fried Chicken Corp., 127 N.H. 318, 320 (1985)). The court will "assume the truth of the plaintiff's pleadings and construe all reasonable inferences therefrom in a light most favorable to the plaintiff." Id.

Ford alleges that it entered into a subcontract with TWG, the general contractor for the construction of store #3535, pursuant to which it was to provide labor and materials in connection with the construction of the store. According to Ford, it completed its work under the subcontract, and is now owed $192,691.16. In their statement of defenses, the defendants contend, *inter alia*, that Ford's claims are "barred or reduced, in whole or in part, because of [Ford's] own breach of contract, negligence or improper actions," and that Ford's "own breach of contract, negligence, or improper actions have caused TWG to incur damages." (Doc. 11, ¶¶ 3 & 4.)

The defendants move to dismiss the case for lack of jurisdiction. Specifically, the defendants assert that Ford contractually agreed to venue in Onondaga County, New York. The defendants maintain that none of the exceptions to venue agreements under RSA 508-A:3 apply to this case, and that therefore the action must either be dismissed or stayed, as the court deems appropriate.

Ford contends that under RSA 508-A:3, which it characterizes as the codification of New Hampshire's policy on contractual venue provisions, a litigant need only demonstrate one basis for keeping a case in New Hampshire to override a contractual agreement to litigate a case in a foreign jurisdiction. According to Ford, one such basis exists in this case, namely, that New York is a substantially less convenient forum in which to conduct a trial in this matter because a site view will likely be necessary. In the alternative, Ford argues that if the court finds litigation should proceed in New York, the court should stay,

rather than dismiss, this case in order to preserve the mechanic's lien Ford previously obtained.

Paragraph 30 of the subcontract states that "the place of trial of any action between [TWG] and [Ford] relating to the subject matter of this Contract shall be **Onondaga County, New York**." (Defs. Mot. to Dismiss, Ex. A) (emphasis in original). Paragraph 30 also provides that the subcontract "shall be governed by the laws of the State of **New York**." (Id.) (emphasis in original).

> In dealing with [the] issue [of whether jurisdiction lies exclusively in Onondaga County, New York], [the court] note[s] that neither party has raised a question of choice of law, or has offered evidence of the substantive rules of [New York] law for the purpose of construing the quoted provision. Foreign law is presumed to accord with the common law of this State in the absence of contrary evidence. On any assumption about applicable law, [the court] must, therefore, construe the language under the principles of New Hampshire's law of contract.

Dancart Corp. v. St. Albans Rubber Co., 124 N.H. 598, 601 (1984) (citation omitted).

The New Hampshire Supreme Court has interpreted language such as that used in the forum selection clause in paragraph 30 of the subcontract as mandating that dispositive action on the case occur in a particular venue. Compare Strafford Technology v. Camcar Div. of Textron, 147 N.H. 174, 176 (2001) (phrase "shall be determined by" mandates jurisdiction) with Dancart, 124 N.H. at 602 (in clause "shall be subject to the jurisdiction of," term "shall" does not mandate jurisdiction, but is grant of authority allowing one court to hear all claims). By providing that the place of trial on any action between Ford and TWG relating to store #3535 "shall be" Onondaga County, New York, the language of paragraph 30 more closely tracks the language of the provision at issue in Strafford Technology, which mandated jurisdiction, than the language in Dancart, which the Court construed as simply granting jurisdictional authority.

However, even where a forum selection clause mandates exclusive jurisdiction in a foreign state, the clause "may still be unenforceable if enumerated statutory exceptions apply." Strafford Technology, 147 N.H. at 176 (citation omitted). To that end, RSA 508-A:3 of the Uniform Model Choice of Forum Act, provides as follows:

> If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless:
> I. The court is required by statute to entertain the action;
> II. The plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
> III. The other state would be a substantially less convenient place for the trial of the action than this state;
> IV. The agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
> V. It would for some other reason be unfair or unreasonable to enforce the agreement.

(1997). Here, Ford argues that section III requires that this case remains in New Hampshire. Accordingly, in resolving the defendants' motion to dismiss, the court considers only whether New York would be a "substantially less convenient place for the trial of [this] action[.]" Id.

Ford argues that section III requires litigation of this matter in New Hampshire because a view will likely be necessary. The defendants counter that a view is not imperative because Ford was hired as a site work contractor and the dispute relative to Ford's payment and performance under the subcontract centers around the removal or installation of dirt on the premises. The defendants maintain that if the court adopts Ford's argument, any venue clause in any construction contract involving out-of-state and in-state parties would be void. The court agrees.

Ford has offered this court the conclusive assertion that a site view will likely be necessary. A review of the subcontract, however, reveals that Ford's duties relative to

store #3535 consist of: mobilization, foundation excavation and backfill, "[e]lectrical [p]lumbing [e]xc/[b]ackfill," building drainage – both coarse and fine grade, exterior concrete sub-base and fine grade and foundation drain. (Defs. Mot. to Dismiss, Ex. A at p. 4.) In the absence of any explanation as to why a view would be necessary or helpful given the type of work Ford was to perform under the subcontract, the court finds the possible need for a view insufficient to render the parties' contractual choice of forum provision unenforceable. Ford has not described the type of work it performed or contracted to perform on store #3535, nor has it explained either what a view, if taken, would reveal, or how the view would assist the trier of fact in resolving the parties' dispute. Under the circumstances of this case, therefore, the court cannot conclude that the parties' forum selection clause is unenforceable.

Under RSA 508-A:3, a court is to dismiss or stay an action if the parties have a written forum selection clause and if the court finds that none of the statutory exceptions to enforcement apply. Because the court finds that section III, the only exception upon which Ford relies, does not apply, the court concludes that the parties' forum selection clause is enforceable. The court, however, finds that dismissal of the case is inappropriate. Instead, the court finds the circumstances of this case render a stay the appropriate remedy.

In Travelers Indemnity Co. v. Abreem Corp., 122 N.H. 583 (1982), the New Hampshire Supreme Court considered whether the trial court erred in declining to dismiss the case for lack of jurisdiction where the plaintiff sued in Massachusetts, but obtained an ex parte attachment of the defendant's New Hampshire real estate. The Court concluded that the trial court should have dismissed the case because the circumstances under which quasi in rem jurisdiction could be exercised were not present. Id. at 585-86.

Specifically, the Court reasoned that "[q]uasi in rem jurisdiction is best analyzed in terms of the two-pronged test this court has applied in the context of in personam jurisdiction." Id. at 585 (quotations and citations omitted). The Court then articulated the standard to be employed: "First, the exercise of jurisdiction must be reasonable in light of New Hampshire's interest in the litigation." Id. (citation omitted). Second, the defendant must have "sufficient minimum contacts with New Hampshire so that the exercise of jurisdiction is consistent with the principles of fair play and substantial justice." Id. (citations omitted). The court finds the above analysis relating to an ex parte attachment of real estate in a civil proceeding is equally applicable in the context of a mechanic's lien.

Applying the standard set forth in Travelers Indemnity Co. to the facts of this case, the court first finds the exercise of jurisdiction reasonable in light of New Hampshire's interest in the litigation. Ford is a New Hampshire corporation with a principal place of business in Rochester, New Hampshire. Store #3535, on which Ford subcontracted with TWG to perform work, is located in Epping, New Hampshire. Additionally, it is apparent from the nature of the work Ford subcontracted to perform that most, if not all, of the actions giving rise to the current lawsuit occurred in New Hampshire. Cf. id. (New Hampshire not related to parties or litigation and has no interest to justify exercise of jurisdiction).

Second, the court finds that Wal-Mart has sufficient minimum contacts with New Hampshire such that the court's exercise of jurisdiction is consistent with the principles of fair play and substantial justice. Notably, the property for which Ford obtained an attachment is related to Ford's cause of action. Cf. id. (mere presence of real estate in New Hampshire insufficient to support exercise of jurisdiction; "[p]roperty must be related to the plaintiff's cause of action if it is to serve as the basis for jurisdiction.") Moreover, the

court takes judicial notice of the fact that, in addition to store #3535, Wal-Mart has several other stores in southern New Hampshire.

Thus, on the facts of this case, the court concludes it is appropriate to stay, rather than dismiss, the case and further finds it is justified in exercising quasi in rem jurisdiction over this case to preserve Ford's mechanic's lien. The defendants, however, offer several arguments in support of their contention that the mechanic's lien should be dismissed.

The defendants contend that Ford contractually waived its right to the lien. The defendants further maintain that Ford failed to give Wal-Mart written notice of its intent to file a claim before performing under the contract as required by RSA 447:5; Ford failed to provide Wal-Mart a written account of the work it performed as required by RSA 447:8; even if Ford were to provide Wal-Mart late notice and accounting, the lien would only be valid to the extent permitted under RSA 447:6; Ford failed to claim the lien within 120 days of the date it last provided work on store #3535; and Ford is not entitled to the lien because the defendants have sufficient assets to satisfy any judgment Ford may recover. Finally, the defendants argue that if the court finds Ford is entitled to a lien, the court should discharge the lien in exchange for a bond, for which Ford is contractually obligated to provide the expenses.

The subcontract provides, in relevant part, as follows:

> [Ford] hereby waives and releases all liens or rights of lien now existing or that may hereafter arise in any manner related to the work, the Project, the land upon which the same is or will be situated, and upon any money or monies due or to become due in connection with the Project, and shall furnish a waiver of any such lien or right of lien, in form and substances satisfactory to [TWG] from every person, firm or corporation furnishing to [Ford] in connection with the work any labor, materials, equipment, tools, plant, facilities, services or anything else for which a right to lien exists.

(Defs. Mot. to Dismiss, Ex. A at ¶24(a).)

Ford claims that advanced waivers, such as that contained in the subcontract, are void as against public policy. According to Ford, the New Hampshire Supreme Court has not had occasion to consider whether advanced lien waivers are enforceable. However, asserting that New York law governs, Ford maintains that the advanced waiver provision is unenforceable under New York Lien Laws §34 and, accordingly, that it is of no consequence even if the New Hampshire Supreme Court would find such a provision enforceable.

As stated previously, Paragraph 30 of the subcontract provides that the subcontract "shall be governed by the laws of the State of **New York**." (Defs. Mot. to Dismiss, Ex. A) (emphasis in original). This language is clear and unequivocal, and the court will not second guess this unambiguous manifestation of the parties' intent to apply New York law to matters pertaining to the subcontract. Appeal of State of N.H., 147 N.H. 426, 429 (2002) (unless writing is ambiguous, court will determine parties' intent according to plain meaning of language used in contract). Thus, the court considers whether an advanced lien waiver is enforceable under New York law.

Article 2, Section 34 of New York's Lien Laws reads, in pertinent part, as follows: "Notwithstanding the provisions of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable." (McKinney 1993). According to the clear and unambiguous language of the foregoing provision, paragraph 24(a) of the subcontract is void as against public policy and unenforceable. Thus, the court declines to dismiss the lien on the basis that Ford waived its right to obtain the lien.

The defendants' remaining arguments are equally unavailing. The defendants' contentions, that Ford failed to give Wal-Mart written notice of its intent to file a claim before performing under the contract, failed to provide Wal-Mart a written account of the work it performed and failed to claim the lien within 120 days of the date it last provided work on store #3535, are not supported. Under Superior Court Rule 57, motions grounded upon facts must be verified by affidavit, agreed to by the parties or otherwise apparent from the record. Here, the defendants did not submit an affidavit, there is no agreement between the parties and it is not otherwise apparent from the record that Ford failed to take necessary actions to secure a lien as alleged by the defendants. Accordingly, the court declines to further consider these claims by the defendants. Moreover, because the defendants have not established that Ford failed to provide proper notice and accounting, the court declines to consider the defendants' contention that even if Ford was to provide Wal-Mart late notice and accounting, the lien would only be valid to the extent permitted under RSA 447:6.

The defendants also assert that Ford is not entitled to the lien because they have sufficient assets to satisfy any judgment Ford may recover. However, unlike the statute that pertains to pre-judgment attachments in civil actions, the mechanic's lien statute has no provision under which a lien will be dismissed upon a showing by the defendant that his assets are sufficient to satisfy a judgment, plus interest and costs, if the plaintiff prevails. Compare RSA 511-A:3 (1997) (once plaintiff satisfies burden of proving reasonable likelihood of recovery, attachment will be granted unless defendant demonstrates sufficient assets to satisfy judgment, plus interest and costs, if plaintiff recovers) with RSA Chapter 447 (2002 & Supp. 2003) (no provision for dismissal of lien upon showing of ability to satisfy judgment).

Finally, the defendants argue that if the court finds Ford is entitled to a lien, the court should discharge the lien in exchange for a bond, for which Ford is contractually obligated to provide the expenses. The court, however, finds that the provision in the subcontract upon which the defendants rely in advancing this argument does not require Ford to post a bond, at its expense, to secure its own lien.

The relevant portion of the subcontract provides as follows:

> In the event that any notice of lien, chattel mortgage, security interest, or conditional sales contract shall be filed relating to the work, [Ford] shall promptly remove or discharge such lien, chattel mortgage, security interest or conditional sales contract by bonding, payment or otherwise[.] If [Ford] shall fail to so remove or discharge the same within four (4) days after notice from [TWG], [TWG] shall have the right to remove or discharge the same by bonding, payment or otherwise, at its sole discretion, for the account of [Ford]. The amount of any costs and expenses incurred by [TWG] in connection with the removal or discharge of any such lien, chattel mortgage, security interest, or conditional sales contract, including bond premiums and legal fees, may be deducted by [TWG] from any payment otherwise due to [Ford][.]

(Defs. Mot. to Dismiss, Ex. A at ¶24(b).) The court finds this provision pertains to notices of liens, chattel mortgages, security interests or conditional sales contracts filed by Ford's subcontractors, but not to Ford itself.

First, the provision would lead to absurd results if it applied to Ford because under the first sentence of the provision, Ford would have to "promptly remove or discharge" the very lien or other encumbrance it just filed. Second, under the next two sentences, if Ford failed to promptly remove or discharge its own lien, TWG would discharge it for Ford's account, at Ford's expense. Thus, when read as applying to liens or encumbrances filed by Ford, the provision is illogical. When read, however, as applying to liens or encumbrances filed by other subcontractors, the provision is entirely logical in that Ford would be required to ensure that such liens or encumbrances were promptly removed or discharged and, upon its failure to do so, TWG would remedy the matter at Ford's

expense. The court therefore finds that paragraph 24(b) does not require Ford to bond its own lien, at its own expense.

Accordingly, the defendants' Motion to Dismiss is **GRANTED**, to the extent that the case is stayed pending the outcome of litigation in Onondaga County, New York or, upon motion from Ford indicating it will not pursue litigation in New York. The defendants' Objection to the Mechanic's Lien Attachment is **DENIED**.

So **Ordered**.

Date: February 10, 2004

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Bruce E. Mohl
Presiding Justice